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HISTORICAL ACCURACY AND THE PROPOSED CONSTITUTION OF INDIANA.

I WOULD not feel called upon to make any rejoinder to Professor Coleman's article in the December number of this magazine, but for the fact that he calls attention to an erroneous statement of fact by me, which is indeed erroneous, as follows: "Mr. Dunn's statement that 'no vote of the people on the question of calling a convention, was taken in 1828 or in 1840,' seems open to question, though I have not had time to look it up at first hand. Mr. W. W. Thornton, in his authoritative article on The Laws of Indiana, in this quarterly, Vol. I, p. 27, gives the number of votes cast both in 1828, and in 1840, and speaks of the question being submitted the 'fourth time,' in 1849."

In the interest of historical accuracy, I trust I shall always be as ready to correct an error of my own as one of another. The question was submitted in 1828 and in 1840; but this point was a minor consideration in my argument, and I was led into error by a rather hasty examination of newspaper files, and the available records in the office of the Secretary of State, without finding any mention of the constitutional question in connection with the election returns. I have since found the records, and, as Mr. Thornton's figures are not quite accurate, I submit the following statement:

The question of holding a convention was submitted to the people in 1828, but the report of the vote by the Secretary of State shows returns from only ten of the fifty-eight counties, the total being 3496 for, and 6130 against a convention. (House Journal, 1828-9, p. 559.) In 1840 the question was again submitted, with a result of 12,277 for, and 61,721 against, in sixty-nine counties, fourteen counties making no returns. (Doc. Journal, 1840, Doc. No. 12.) In the face of this vote of five to one, the question of further submission was agitated all through the forties, and another vote was taken in 1846, which resulted 33,175 for a convention and 28,843 against, a total of less than half of the 126,123 votes cast at the election.

These facts, however, make the "precedent" for the exercise of legislative power much stronger than it would have been on my original statement. I had gone on the theory that there had been no expression whatever from the people; but here were two votes against a convention at the twelfth year periods specified by the constitution of 1816, and a third vote, at an unauthorized period, in which the majority of the voters did not vote on the question.

There was urgent contention at the time that the legislature had no constitutional right to submit the question of a convention except at a twelfth year period. A review of this sentiment, by Mr. Thornton, will be found in the Report of the Indiana Bar Association, for 1902, p. 152. But notwithstanding this claim, and notwithstanding the adverse votes of the people, the legislature of 1849 again submitted the question; and the legislature of 1850 called a convention without the powers assigned to a convention by the constitution of 1816, or by the last vote of the people.

Professor Coleman says that if this "proves anything, it proves too much, namely the right of the legislature to submit any question even if it be expressly prohibited by the constitution." I dissent. Nobody has ever made any such claim heretofore; and the action was defended in the convention of 1851, on the express ground that the constitution did not prohibit it, although it did not specifically authorize it. This is in exact line with the repeated decisions of our Supreme Court, that: "The legislative authority of this State is the right to exercise supreme and sovereign power, subject to no restrictions except those imposed by our constitution, by the Federal Constitution, and by the laws and treaties made under it" (101 Ind., p. 564).

Nobody has any power to impose any restriction of "precedent" on the exercise of legislative power. This is not a government of precedents, but of a written constitution. But if it be desired to consider precedent, as an academic proposition, I repeat that the action of 1851, is a precedent for a greater exercise of legislative power, not expressly prohibited by the constitution, than the action by the legislature of 1911, in submitting a proposed constitution to a vote of the people.

J. P. DUNN.